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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS ROBERT CHAVEZ,

Defendant and Appellant.

C084982

(Super. Ct. No. 15F04824)

An amended information charged defendant Thomas Robert Chavez with kidnapping to commit rape (Pen. Code, § 209, subd. (b)(1); statutory section references that follow are to the Penal Code unless otherwise stated; (count one)) and assault with intent to commit rape (§ 220; (count two)). The information further alleged that defendant had sustained four prior convictions within the meaning of section 667, subdivisions (b) through (i), and one prior serious felony conviction within the meaning of section 667, subdivision (a).

Defendant waived his right to a jury trial. The trial court convicted defendant of both counts and sustained the prior conviction allegations.

The court sentenced defendant to state prison for 25 years to life for count one plus five years (§ 667, subd. (a)). The court stayed sentence on count two.

Defendant appeals. He contends (1) the trial court abused its discretion and violated his right to due process of law by admitting evidence of his prior sex crimes, (2) Evidence Code section 1108 violates his due process and equal protection rights, (3) in the event issue 2 is deemed forfeited, he was deprived of the effective assistance of counsel, and (4) the trial court imposed an unauthorized fine in imposing a sex offender fine which includes an amount for count two which was stayed. In a supplemental brief, he contends the matter should be remanded to allow the trial court to determine whether to exercise its discretion under the newly enacted Senate Bill No. 1393 to the section 667 enhancement. We remand for the trial court to determine whether to exercise its discretion to strike the section 667 enhancement, reduce the sex offender fine to \$300, and otherwise affirm the judgment as modified.

FACTS AND PROCEEDINGS

About 12:40 a.m. on August 6, 2015, while on road patrol in south Sacramento, California Highway Patrol Officers Michael Courtnier and Jason Aston saw a black Chevy Impala drive very slowly through a parking lot and continue to the back of a building. No businesses were open. The officers drove around to the back of the building and found the car parked in a dark area with its engine off. The officers put two spotlights on the car. As Officer Courtnier started to walk towards the car, he heard a woman yell for help and say that the driver, later identified as defendant, had a weapon. Officer Courtnier then saw defendant reach through the steering wheel and heard the engine start. The officers ordered defendant to turn off the engine. Defendant did so and

followed the officers' orders to drop the keys on the ground, get out of the car, and lift his shirt. Officer Courtnier searched defendant and then handcuffed him.

Officer Aston then ordered the woman, V., to get out of the car. When she did, she was hysterical and crying. When asked if she had weapons on her, she stated that for protection, she had a small pocketknife and pepper spray, both of which she gave to the officer.

When interviewed after the car had been stopped, the victim had tears in her eyes and was shaking. She freely admitted she was a prostitute. The victim claimed she was not working at the time defendant abducted her. When she was searched, she did not have condoms or birth control products with her, items a prostitute commonly possesses when arrested for prostitution.

The victim said that defendant held a black-handled pointed screwdriver at her neck and forced her into his car. About 15 to 20 yards away from defendant's car, Deputy Sheriff Walther found a black-handled screwdriver that had been filed down to a sharp point. The victim identified the screwdriver as the weapon defendant had pointed at her neck. When booked into jail, defendant did not possess any cash and no cash was found in his car.

At trial, the victim stated that after working as a prostitute from 8:00 to 11:00 p.m. near Stockton Boulevard, she returned to her room at a motel and took a shower. She then walked to a nearby liquor store but it was closed so she went to another store but it was also closed. She turned around and crossed the street to walk back to her motel. She saw the Impala following her, and had seen it earlier driving back and forth when she had been working. The driver never pulled over to ask her for a "date." She thought something was wrong and crossed the street. She saw the car make a quick U-turn and she kept walking. Then she heard a car door open and someone jog up behind her. Defendant grabbed her and put a sharp, pointy weapon to her neck, ordering her not to scream. He forced her into his car and then drove off with the weapon to her neck,

repeatedly telling her not to scream. He drove behind the business building and turned off the car lights. He still had the weapon to her neck and she begged him not to hurt her. He told her she would get her money. She tried to use her cell phone but defendant tried to grab it from her. She was scared and did not know what defendant planned to do to her. When she saw the bright light, she told defendant it could be the police. Defendant ordered her to hold his hand so it looked like she was his girlfriend but she refused and started to scream for help. At some point, she saw defendant throw something out the car window.

The prosecution presented prior sex crime evidence. On February 8, 1988, 12-year-old S. was walking home alone from middle school in South Sacramento on a path behind a supermarket when a male jogger, defendant, approached her from behind. He went past her but slowed down as if to catch his breath. When S. started to walk by him, defendant placed a hand over her mouth and threw her to the ground. She struggled but defendant got on top of her, put his hand over her mouth, and ripped her shirt, exposing her breasts. When he tried to remove her pants, she bit his hand. He bit her on her cheek, grabbed her around the neck, and attempted to drag her away from the path. She kned him in the groin and said her mother was waiting nearby and would be looking for her. Defendant stopped and fled. For his offenses against S., defendant was convicted of forcible lewd act with a child under the age of 14 years.

For offenses against P., who was deceased, the prosecution presented documents reflecting that defendant was convicted in 1988 of attempted forcible rape with infliction of great bodily injury, forcible oral copulation with infliction of great bodily injury, forcible rape with infliction of great bodily injury, and robbery.

DISCUSSION

I

Prior Crimes Evidence

Defendant contends the trial court abused its discretion in admitting the prior crimes evidence. Defendant argues the trial court's error had the legal consequence of violating his right to due process of law.

In limine, the prosecution sought to admit evidence of defendant's prior sex crimes against S. and P. pursuant to Evidence Code section 1101, subdivision (b), to prove defendant's intent, motive, and absence of mistake, and pursuant to Evidence Code section 1108 to show his propensity to commit sexual assaults.

With respect to S., the prosecution set forth the facts underlying defendant's crimes in the prosecution's in limine motion which facts were later brought forth during the evidentiary portion of the trial as previously discussed. With respect to P., the prosecution proffered that about 11:15 p.m. on March 31, 1988, the 23-year-old victim left work at a convenience store and started home. A car passed her and pulled over. Defendant got out, left the engine running, and walked past her. He then came up behind her, grabbed her throat, and put his hand over her mouth. She struggled and screamed. He hit her in the face and told her, "Shut up or I'm going to kill you!" She struggled more and he hit her again in the face. He dragged her into a yard and pushed her to the ground. After he forced her to orally copulate him, he then raped and sodomized her. As he left, he stole money from her pockets. When defendant was arrested for his crimes against S. and P., he admitted he had been committing such crimes since he was a juvenile and that he had a problem. The prosecutor also noted that defendant had been committed to the California Youth Authority (CYA) for sexual assault on a 26-year-old woman.

Defense counsel opposed the evidence as remote, too dissimilar to the charged offenses against the victim who was never sexually touched to show intent and motive, and more prejudicial than probative.

The court ruled the evidence was admissible under both Evidence Code sections 1101 and 1108. The court found the evidence highly relevant on defendant's intent, motive and absence of mistake, the latter of which being whether the sexual act to occur was consensual. The court found the facts underlying the priors were "similar, if not identical, to the pending charges." Under Evidence Code section 352, the court found the probative value outweighed its prejudicial effect, commenting that it was a "court trial, and the Court is very mindful of the limited purpose of such evidence and can confine its use solely for that purpose." The court determined that the priors were not remote "given the fact that [defendant] served a 26-year sentence for his convictions and was only just out of custody on parole prior to the . . . alleged commission of the pending offenses."

The court stated that the prior evidence was also admissible with respect to count two (assault with intent to commit rape) under Evidence Code sections 1108 and 352. The court determined it would hear the victim's testimony first in order to evaluate the prosecutor's need for the prior crimes evidence. The court subsequently found that the prior evidence was also admissible with respect to count one (kidnapping with intent to commit rape) under Evidence Code sections 1108 and 352.

After hearing the victim's testimony at trial, the court confirmed its in limine rulings. The court noted that during cross-examination, defense counsel attempted to portray the victim as willing and compliant because she was a prostitute and imply that the act was consensual.

Evidence Code section 1101 provides:

"(a) Except as provided in this section and in Sections . . . 1108 . . . , evidence of a person's character or a trait of his or her character (whether in the form of an opinion,

evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

“(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.”

Evidence Code section 1108, subdivision (a), provides: “In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.”

“Evidence of prior crimes [under Evid. Code, § 1108] is admissible, unless otherwise excluded by Evidence Code section 352, whenever it may be helpful to the jury on a commonsense basis, for resolution of any issue in the case, including the probability or improbability that the defendant has been falsely accused. [Citation.]” (*People v. Robertson* (2012) 208 Cal.App.4th 965, 990.) We review a trial court’s admission of prior crimes evidence for abuse of discretion and will not reverse absent a showing that the trial court’s ruling was arbitrary or capricious. (*Id.* at p. 991.)

Defendant argues that the court abused its discretion in admitting the evidence to show intent, motive and absence of mistake because the prior crimes evidence was too dissimilar to the current crimes. Defendant complains that the evidence that he intended to rape the current victim was weak and the trial court erred in relying on S. Doe’s testimony to prove the missing element.

The offenses were all quite similar. As the trial court stated, defendant was an opportunist, attacking his victims when they were vulnerable and he used the element of surprise. All of his victims were strangers and he said nothing before grabbing them. As

the trial court noted, defendant had followed the current victim, driving back and forth while she had been working earlier in the evening. The prior crimes evidence assisted the court in determining whether defendant's encounter with the current victim was consensual. The trial court did not abuse its discretion in admitting the prior crimes evidence to show defendant's propensity to commit such crimes.

Defendant complains that because S. was a child at the time of the offense, the prior crimes evidence involving S. was unduly prejudicial, served no purpose other than to invoke an emotional response, and infected the trial with unfairness in violation of his right to due process of law. He complains the same with respect to the "violent details" of his crimes against P. and his admissions about his crimes.

Defendant waived his right to a jury trial. In ruling on the in limine motion, the trial court specifically noted there would be no issue of jury confusion, being misled or distracted, since it was a court trial and the court was mindful of the limited purpose of the evidence.

“ ‘ “The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues*. In applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’ ” [Citation.]’ [Citation.]” (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) The prior sex crimes evidence involving S. was directly relevant to the current victim's credibility. Defendant's trial was not fundamentally unfair and he was not deprived of due process of law. (See, *People v. Falsetta* (1999) 21 Cal.4th 903, 913 (*Falsetta*).)

Having decided the prior crimes evidence was admissible under Evidence Code sections 1108 and 352, we need not discuss the admissibility under Evidence Code section 1101, subdivision (b).

II

Section 1108

Defendant next contends that Evidence Code section 1108 violates due process and equal protection. We reject his claim.

Evidence Code section 1108 meets due process requirements. (*Falsetta, supra*, 21 Cal.4th at p. 922.) We are bound by decisions of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Evidence Code section 1108 does not violate equal protection requirements. “Neither the federal nor the state constitution bars a legislature from distinguishing among criminal offenses in establishing rules for the admission of evidence; nor does equal protection require that acts or things which are different in fact be treated in law as though they were the same.” (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1311 [equal protection challenge to Evid. Code, § 1109].) “The Legislature determined that the nature of sex offenses, both their seriousness and their secretive commission which results in trials that are primarily credibility contests, justified the admission of relevant evidence of a defendant’s commission of other sex offenses. This reasoning provides a rational basis for the law.” (*People v. Fitch* (1997) 55 Cal.App.4th 172, 184.)

III

Ineffective Assistance of Counsel

Having rejected defendant’s claims underlying his contention that he did not receive the effective assistance of counsel on the merits, since there was no error, we need not discuss whether defense counsel rendered ineffective assistance in failing to object to the prior crimes evidence based on due process/equal protection grounds.

IV

Fines

The trial court imposed sentence on count one and stayed sentence on count two. The trial court imposed a \$500 fine pursuant to section 290.3. Defendant contends the trial court imposed an unauthorized fine in imposing a sex offender fine which includes an amount for count two which was stayed. We agree.

Section 290.3, subdivision (a), provides:

“Every person who is convicted of any offense specified in subdivision (c) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars (\$300) upon the first conviction or a fine of five hundred dollars (\$500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine.” Both of defendant’s offenses are listed in section 290, subdivision (c).

“Punitive fines cannot be imposed on counts that are stayed pursuant to section 654. [Citation.]” (*People v. Gonzales* (2017) 16 Cal.App.5th 494, 504.) We will reduce the total sex offender fine to \$300.

V

The Section 667 Enhancement

Under the law that was in effect on the date of defendant’s sentencing, a person convicted of a serious felony with a prior serious felony conviction was subject to a five year enhancement. (Former § 667, subd. (a).) Thus, at the time defendant was sentenced, a trial court did not have discretion to strike the enhancement in the interests of justice. (Former § 1385, subd. (b).) On September 30, 2018, the Governor signed Senate Bill No. 1393, which amended sections 667 and 1385 to give the trial court the

discretion to strike the serious felony enhancement in the interests of justice. (Stats 2018 ch 1013 § 2; §§ 1385, 667, subd. (a).)

Defendant contends, and the People concede, that because defendant's conviction is not yet final, the amendment to sections 667 and 1385 makes him eligible for remand for resentencing and potential imposition of a reduced sentence and thus applies retroactively. (See *People v. Brown* (2012) 54 Cal.4th 314, 323-324 [exception to ordinary presumption that statutes operate prospectively where "the Legislature has amended a statute to reduce the punishment for a particular criminal offense"]; *In re Estrada* (1965) 63 Cal.2d 740, 748 [for a nonfinal conviction, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"]; see also *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507 [applying *Estrada* rule to similar legislation giving courts discretion to strike firearm enhancements]; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [same].) We agree.

Unlike the court in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, here, we cannot say "the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." Accordingly, we shall remand for the trial court to determine whether to exercise its discretion to strike the enhancement.

DISPOSITION

The matter is remanded for the trial court to determine whether to exercise its discretion to strike the section 667, subdivision (a) enhancement pursuant to section 1385. The judgment is modified to reduce the sex offender fine (§ 290.3) to \$300. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment to reflect the reduced fine, and, if the court strikes the enhancement, the striking of the enhancement. The court is further directed to forward a

certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

HULL, Acting P. J.

We concur:

ROBIE, J.

HOCH, J.